Anwar et al v. Fairfield Greenwich Limited et al Doc. 154

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANWAR, *et al.*,

Plaintiffs,

-against-

FAIRFIELD GREENWICH LIMITED, *et al.*,

Defendants.

This Document Relates To: *Knight Services Holdings Limited et al. v. Fairfield Sentry Limited, et al.*, 1:09-cv-02269 (VM)

Master File No. 09-cv-118 (VM)

Dated: May 29, 2009

THE ANWAR PLAINTIFFS' MEMORANDUM IN OPPOSITION TO THE MOTIONS OF FAIRFIELD INVESTOR GROUP AND KNIGHT SERVICES PLAINTIFFS FOR APPOINTMENT AS LEAD PLAINTIFF

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INTRODUCTION

Lead plaintiff movants Securities & Investment Company (SICO) Bahrain, Harel Insurance Investments and Financial Services Ltd., Pacific West Health Medical Center, Inc. Employees' Retirement Trust, St. Stephen's School, and AXA Private Management (the "Anwar Plaintiffs") respectfully submit this Memorandum in opposition to the competing lead plaintiff motions filed by Madanes Investment & Enterprise Ltd., Carling Investment Ltd., Shimon Laor, and Arie and Dafna Gruber (collectively, the "Fairfield Investor Group") and by The Knight Services Holdings Limited and the Americas/SwissCo. Trusts (the "Knight Services Plaintiffs"), pursuant to § 21D(a)(3)(B) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u-4(a) (the "Exchange Act"), as amended by the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), 15 U.S.C. § 78u-4 et seq.

The Anwar Plaintiffs are entitled to the presumption in favor of the lead plaintiff movant with the largest financial interest in the relief sought in the action. The Anwar Plaintiffs lost over $26 million on their purchases of shares of Fairfield Sentry Limited ("Fairfield Sentry") and Fairfield Sigma Limited ("Fairfield Sigma"). Comparatively, the Fairfield Investor Group lost less than $1 million due to their purchases of Fairfield Sentry shares and the Knight Services Plaintiffs lost less than $1.5 million on their purchases.

This consolidated action is brought on behalf of investors in investment funds issued and managed by the Fairfield Greenwich Group ("FGG"). FGG funneled some $7.5 billion of its clients' assets into the Ponzi fraud run by Bernard L. Madoff and Bernard L. Madoff Investments Securities, LLC. ("Madoff"). Those assets were lost as a result of FGG and the affiliated FGG defendants' reckless misrepresentations about the Madoff investments coupled with knowing failure to conduct due diligence of Madoff's fraudulent business operations. The FGG defendants intentionally, knowingly, or recklessly overlooked obvious red flags with respect to the Ponzi scheme and are principally liable to investors for the resulting losses. Defendants were motivated to ignore Madoff's Ponzi scheme to reap hundreds of millions of fees from FGG's investors.

The Anwar Plaintiffs are already named plaintiffs in a Consolidated Amended Complaint ("CAC") asserting state law claims (including common law fraud claims) against defendant FGG and persons affiliated with FGG. The Anwar Plaintiffs seek appointment as lead plaintiff on the federal securities claims. This will help ensure efficient management and prosecution of claims for recovery on behalf of all investors in the Funds. The state claims and the federal securities claims arise from the same underlying facts. There is no conflict in having one group of plaintiffs and plaintiffs' counsel asserting both state and federal claims.

Neither the Fairfield Investor Group nor the Knight Services Plaintiffs can rebut the presumption of adequacy in favor of the Anwar Plaintiffs. *See* §78u-4(a)(3)(B)(iii)(I)(bb). The Anwar Plaintiffs are typical of investors in FGG-sponsored funds, in that their claims arise out of FGG's misrepresentations and lack of due diligence with respect to Madoff's massive Ponzi scheme. The Anwar Plaintiffs have already demonstrated their adequacy to represent the investors by filing the detailed CAC asserting state law claims against the same defendants, and by retaining counsel already appointed by the Court as interim co-lead counsel.

ARGUMENT

THE ANWAR PLAINTIFFS SHOULD BE APPOINTED LEAD PLAINTIFFS

A. The Anwar Plaintiffs Have the Largest Financial Interest

The PSLRA requires, among other things, that the Court presume that the most adequate plaintiff is the person or group with the largest financial interest in the relief sought in the action.

PSLRA § 21(a)(3)(B)(iii)(I), 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). The Anwar Plaintiffs are entitled to this presumption. The following chart shows the losses suffered by the Anwar Plaintiffs compared to those experienced by the Fairfield Investor Group and Knight Services Plaintiffs.

Name	Net Number of Shares Purchased	Approximate Loss (using $0 set-off)[1]
Anwar Plaintiffs		
SICO Bahrain	2,477.7437	$2,815,000
Harel Insurance Investments and Financial Services Ltd.	7,279.8145	$8,700,000
Pacific West Health Medical Center, Inc. Employees' Retirement Trust	154.8452	$200,000
St. Stephen's School	6,349.54	$1,167,944
AXA Private Management	59,436.52	$13,979,117[2]
Total for Anwar Plaintiffs	**75,698.463**	**$26,862,061**
Fairfield Investor Group		
Madanes Investment and Enterprise Ltd.	199.7742	$250,000
Carling Investment Ltd.	76.888	$100,000
Shimon Laor	408.28	$446,891
Arie and Dafna Gruber	99.73	$120,000
Total for the Fairfield Investor Group	**784.6722**	**$916,891**
The Knight Services Plaintiffs		
The Knight Services Holdings Limited	408.1116	$500,000
The Chartwell Trust	74.409	$99,999
The Casoti Trust	119.79	$124,994
The Samba Trust	246.60	$274,999
The White Chapel Trust	396.592	$499,999
Total for The Knight Services Plaintiffs	**1,245.5026**	**$1,499,991**

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[1] For purposes of this Memorandum, the Anwar Plaintiffs assume that the value of the shares of Fairfield Sentry and Fairfield Sigma are zero.

[2] The Investment by AXA Private Management in Fairfield Sigma was made in Euros. Fairfield Sigma offered three classes of shares based on three foreign currencies, the Euro, Singapore Dollar, and Yen. Fairfield Sigma invested its assets principally into Fairfield Sentry with some assets used to hedge the dollar exposure of its investment into Euros. The amount shown is the value in U.S. dollars based on an exchange rate of $1.3628 on May 8, 2009, as reported in the May 11, 2009 The Wall Street Journal.

Four of the five Anwar Plaintiffs individually have a larger financial interest than both the Fairfield Investor Group and The Knight Services Plaintiffs, individually or as a whole. Further, the Anwar Plaintiffs as a whole have a financial interest that is over 29 times greater than the Fairfield Investor Group as a whole and over 17 times greater than The Knight Services Plaintiffs as a whole.

Moreover, looking only at the three Anwar Plaintiffs who purchased Fairfield Sentry shares, even these plaintiffs alone still have a substantially larger financial interest than both the Fairfield Investor Group and The Knight Services Plaintiffs. However, the inclusion of Fairfield Sigma shareholders in the Anwar Plaintiffs group is appropriate as well, because the Sigma fund was merely a feeder fund into Sentry for purchasers using Euros rather than dollars.

B. The Anwar Plaintiffs Adequately Represent the Interests of Investors With Respect to the Federal Securities Claims

The Anwar Plaintiffs already have demonstrated that they satisfy the Rule 23 requirements. *See* Memorandum of Law in Support of Motion of the Anwar Plaintiffs for Appointment as Lead Plaintiffs and for Approval of Lead Counsel (the "Anwar Plaintiffs' Mem.") at 8-11. The Anwar Plaintiffs intend to assert federal securities claims in a Second Consolidated Amended Complaint. It is clearly not in the interest of investors to have separate plaintiffs and counsel litigating federal securities claims independently from the substantially similar state law claims. *See e.g. Muller-Paisner v. TIAA*, 289 Fed. Appx. 461, 463 (2d Cir. 2008) ("The elements of claims for federal securities fraud and New York common law fraud are similar."); *Trinity Bui v. Indus. Enters. of Am.*, 594 F. Supp. 2d 364, 373 (S.D.N.Y. 2009) ("The elements of common law fraud thus are largely the same as those of a Rule 10b-5 claim except that there is no requirement that the state fraud be 'in connection with the purchase or sale of securities'").

Federal securities claims were not previously asserted in the CAC because of concerns whether the benefits of such claims outweighed the potential application of the discovery stay that would apply under the PSLRA. However, given that federal securities claims have now been brought and the PSLRA stay issues will need to be considered by the Court, the Anwar plaintiffs and undersigned interim co-lead counsel believe it is appropriate for the federal securities claims to be joined to the existing CAC[3].

The Anwar Plaintiffs are part of a larger group of representative plaintiffs who have brought state claims on behalf of a larger group of investors.[4] The Anwar Plaintiffs and their proposed Co-Lead Counsel have demonstrated that they can work together effectively to advance the interests of all investors by their vigorous prosecution of the *Anwar* Consolidated Action to date, including by prevailing in a contested dispute with Defendants over entry of a Case Management Order, filing the Consolidated Amended Complaint, conducting the Rule 26(f) conference and serving initial disclosures under Rule 26(a).

The instant motion by Fairfield Investor Group represents the second attempt by its counsel to secure a lead role. An earlier complaint filed by the same counsel named as plaintiffs two members of the Fairfield Investor Group, Shimon Laor and Mandanes Investment & Enterprise Ltd. *See Laor, et al. v. Fairfield Greenwich Group et al*, 1:09-cv-02222 (VM) (the "*Laor* Complaint", filed March 10, 2009). That complaint did not contain any federal securities fraud claims, but rather was limited to one count arising under the Investment Advisors Act, 15 U.S.C. § 80b-1 *et seq*. On March 11, 2009, counsel for the *Laor* plaintiffs sent a letter to the

[3] It is plaintiffs position that discovery should proceed on state law claims pursuant to the existing Case Management Order notwithstanding the addition of federal securities claims which are similar to one or two (but by no means all) of the state law claims, and only discovery that uniquely concerns the federal securities claims should be stayed.
[4] The federal securities claims, for example, are limited to a a five year statute of under the Exchange Act. *See* 28 U.S.C. § 1658(b). The state law fraud claims, for example, are only subject to a six year statute of limitations running from the actual or constructive knowledge of the fraud.

Court requesting consolidation of *Laor* into the *Anwar* Consolidated Action and appointment of their counsel as fourth interim co-lead counsel. On March 13, 2009, the Court denied the counsel request: "The Court is not persuaded that additional co-lead counsel services are necessary or in the interest of the proposed class. The interests of the *Laor* plaintiffs can be adequately protected by existing lead counsel as part of the consolidated action." *See Laor v. Fairfield Greenwich Group*, 1:09-cv-02222 (VM), Docket No. 3 (March 23, 2009).[5] There is no reason to reach a different result now, when the same parties and counsel effectively seek the same result by making a request to add a federal securities claim which members of the Fairfield Investor Group did not initially assert.

The Anwar Plaintiffs are the most adequate representatives. The named plaintiffs in the *Anwar* Consolidated Action represent a wide range of potential class representatives who will ensure adequate representation of the interests of all potential class members.

C. The Anwar Plaintiffs Represent Both Shareholders in Fairfield Sentry and Fairfield Sigma

The Anwar Plaintiffs include shareholders of both Fairfield Sentry and Fairfield Sigma. Fairfield Sigma was created solely for the purpose of offering investors a Euro denominated entryway into Fairfield Sentry. The Fairfield Sentry and Fairfield Sigma claims are substantially similar and to promote efficiency, should be prosecuted together. Neither the Fairfield Investor Group nor the Knight Services Plaintiffs include investors in Fairfield Sigma. Inasmuch as the Anwar Plaintiffs represent a broader diversity of investor interests, they will more adequately represent the claims of all investors.

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[5] The Court ordered the consolidation of the *Laor* Action into the *Anwar* Consolidated Action on March 23, 2009. *See Anwar et al. v. Fairfield Greenwich Limited et al.*, 1:09-cv-00118 (VM), Docket No. 73 (March 23, 2009).

CONCLUSION

The Anwar Plaintiffs respectfully request that their motion for appointment as lead plaintiff be granted, and that interim co-lead counsel be approved as lead counsel on the federal securities claims, and that the motions of Fairfield Investor Group and the Knight Services Plaintiffs for such appointment be denied.

Dated: May 29, 2009

Respectfully submitted,

By: s/ James A. Harrod

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Proof of Service

I hereby certify that on May 29, 2009, the Anwar Plaintiffs' Memorandum in Opposition to the Motions of Fairfield Investor Group and Knight Services Plaintiffs for Appointment as Lead Plaintiff was served upon all counsel who have filed Notices of Appearance in this action through CM/ECF.

_s/ James A. Harrod__

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